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IN THE
COURT OF APPEALS OF INDIANA

MARVIN REFFETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 39A01-0610-CR-478
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JEFFERSON SUPERIOR COURT
The Honorable Fred H. Hoying, Judge
Cause No. 39D01-0304-FD-516

April 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Marvin Reffett appeals his sentences for operating a vehicle while intoxicated, a Class D felony, operating a vehicle after a lifetime suspension, a Class C felony, and his status as an habitual substance offender. On appeal, Reffett raises the sole issue of whether his aggregate eight-year sentence is appropriate given his character and the nature of his offense. Concluding that his sentence is not inappropriate, we affirm.

Facts and Procedural History[1]

At roughly 10:30 a.m. on April 12, 2003, Madison police officer B.A. Heaton stopped Reffett's vehicle after observing him driving left of the center lane. An Arby's employee had also alerted Officer Heaton to Reffett's impaired condition. Reffett failed to stop immediately after the officer activated his lights and siren. Officer Heaton's probable cause affidavit indicates that Reffett had glassy eyes and slurred speech, and that there were alcoholic containers in plain view in Reffett's vehicle. Reffett refused to exit his vehicle to take field sobriety tests, and also refused to take a chemical test. On April 14, 2003, the State charged Reffett with operating a vehicle while intoxicated and operating a vehicle as an habitual traffic violator. On April 16, 2003, the State amended its charging information to charge Reffett with operating a vehicle after a lifetime suspension.

On September 29, 2003, the parties entered into an Agreed Order, under which Reffett

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[1] The State argues that Reffett failed to present an adequate factual record and has therefore waived review of the nature of his offense. We initially note that we have a strong preference for deciding issues on their merits rather than invoking waiver. See State v. Hancock, 530 N.E.2d 106, 107 (Ind. Ct. App. 1988), trans. denied. Also, we note that Reffett's Appendix contains the probable cause affidavit, from which we can

was to complete a one-year program with the Salvation Army. On December 2, 2004, the parties signed a plea agreement pursuant to the terms of the Agreed Order. Before accepting the plea agreement, the trial court required a pre-sentence report. On December 14, 2004, the pre-sentence report was filed, revealing to the State facts not previously known, namely, that Reffett had completed only seven months in the Salvation Army program,[2] and that subsequent to entering into the Agreed Order, Reffett had committed and been convicted of two substance abuse offenses. The State filed a motion to withdraw the plea agreement, and the trial court granted this motion following a hearing on January 26, 2005. On March 7, 2005, the State filed a charging information alleging that Reffett was an habitual substance offender. On March 30, 2005, Reffett pled guilty to all three counts. The trial court sentenced Reffett to an aggregate eleven-year sentence. On appeal, this court held that Reffett's sentence was not authorized by statute and remanded for a second sentencing hearing. Reffett v. State, 844 N.E.2d 1072 (Ind. Ct. App. 2006). On June 7, 2006, the trial court conducted this sentencing hearing. On June 15, 2006, the trial court ordered that Reffett serve the maximum three-year sentence for operating a vehicle while intoxicated,[3] enhanced by three years for his status as an habitual substance offender, and the maximum

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discern the material facts surrounding Reffett's arrest. We decline the State's invitation to deem Reffett's argument waived, and will recite the facts and address his argument on its merits.

[2] In his reply brief, Reffett argues that he successfully completed the Salvation Army program. Because Reffett's success or lack thereof in this program does not affect our decision, we will assume for purposes of this appeal that he successfully completed the program.

[3] Ind. Code § 35-50-2-7.

eight-year sentence for operating a vehicle after a lifetime suspension.[4] The trial court ordered that these sentences be served concurrently, resulting in an aggregate eight-year sentence. Reffett now appeals his sentence.

Discussion and Decision[5]

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence[6] "is

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[4] Ind. Code § 35-50-2-6.

[5] According to the record, Reffett's projected release date, assuming he earned credit time for each day served, was January 22, 2007. Appellant's App. at 124. If Reffett has indeed completed this sentence and been released, then the issue of whether his sentence is inappropriate is moot. Lee v. State, 816 N.E.2d 35, 40 n.2 (Ind. 2004) (noting that "[o]nce 'sentence has been served, the issue of the validity of the sentence is rendered moot.'" (quoting Irwin v. State, 744 N.E.2d 565, 568 (Ind.Ct.App.2001))). However, as the record does not indicate that Reffett has actually completed his sentence, we will address the merits of Reffett's argument.

[6] Our legislature amended our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Reffett committed the criminal offense before this statute took effect, but was ultimately sentenced after. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not explicitly ruled which sentencing scheme applies in these situations, but a recent decision seems to indicate that the date of sentencing is the critical date. In Prickett v. State, 856 N.E.2d 1203 (Ind. 2006), the defendant committed the crimes and was sentenced prior to the amendment date. In a footnote, our supreme court states that "[w]e apply the version of

the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). When determining whether a sentence is appropriate, we must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied.

We first turn to the nature of the offense. Reffett argues that the nature of his offense does not justify a maximum sentence because he was not involved in an accident, did not injure anyone, and caused no property damage. Had Reffett injured someone, his action would have constituted a more serious offense. See Ind. Code §§ 9-30-5-4 (C felony when driver with prior OWI conviction causes serious bodily injury); 9-30-5-5 (B felony when driver with prior OWI causes death). All that was required under for Reffett to be convicted of his offenses was that he was driving while intoxicated and after his license had been suspended for life. We are unable to determine precisely how intoxicated Reffett was, as he refused to take either a field or chemical sobriety test. However, we do know that Reffett had glassy eyes, slurred speech, unsteady balance, and staggered from his vehicle. Additionally, we glean insight into Reffett's state of intoxication from the fact that an Arby's employee working the breakfast shift was able to detect Reffett's intoxication and thought it a serious enough situation to alert police. Finally, Reffett was operating his vehicle left of the centerline, in the path of oncoming traffic. Although we agree that nothing in the record

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the statute in effect at the time of Prickett's sentence and thus refer to his 'presumptive' sentence, rather than an 'advisory' sentence." Id. at 1207 n.3 (emphasis added). Because Reffett does not argue that his sentence is improper, and argues only that it is inappropriate, we need not decide whether the advisory or presumptive sentencing scheme applies in this case. See generally, Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App.

indicates that Reffett's offense was the worst conceivable act of operating a vehicle while intoxicated or driving after having a suspended license, and that the nature of the offense alone would likely not support a maximum sentence, we are not prepared to say that there was nothing egregious about Reffett's offense.

In regard to Reffett's character, Reffett has amassed at least twenty prior convictions, including twelve prior convictions for operating a vehicle while intoxicated. Additionally, between the time of his arrest and sentence for these offenses, Reffett committed two additional offenses. An examination of Reffett's criminal history indicates that since 1976, Reffett has failed to go four years without being convicted of a crime. Such a record indicates a complete lack of respect and disregard for the laws of this state. In short, this extensive criminal history leads us to agree with the trial court's statement: "If the maximum legislative sentence does not fit this defendant, surely no one would qualify." Appellant's App. at 125.

Conclusion

We conclude that the Reffett's sentence is not inappropriate given his character and the nature of the offense.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.

2006), trans. denied. We use the term "advisory" in this opinion, but in no way imply that the advisory sentencing scheme applies to Reffett's situation.